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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

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7 Case No. 2:17-CV-03069 (VEB)

8 VIRGINIA FRANCINE MARTINEZ,

9 Plaintiff,

10 vs.

11 NANCY BERRYHILL, Acting
Commissioner of Social Security,

12 Defendant.

DECISION AND ORDER

13
14 **I. INTRODUCTION**

15 In August of 2013, Plaintiff Virginia Francine Martinez applied for Disability
16 Insurance benefits and Supplemental Security Income benefits under the Social
17 Security Act. The Commissioner of Social Security denied the applications.

1 Plaintiff, by and through her attorney, Joshua W. Potter, Esq., commenced this
2 action seeking judicial review of the Commissioner's denial of benefits pursuant to
3 42 U.S.C. §§ 405 (g) and 1383 (c)(3).

4 The parties consented to the jurisdiction of a United States Magistrate Judge.
5 (Docket No. 13, 14). On April 6, 2018, this case was referred to the undersigned
6 pursuant to General Order 05-07. (Docket No. 24).

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8 **II. BACKGROUND**

9 Plaintiff applied for benefits on August 22, 2013, alleging disability beginning
10 July 11, 2013. (T at 14).¹ The applications were denied initially and on
11 reconsideration. Plaintiff requested a hearing before an Administrative Law Judge
12 ("ALJ").

13 On March 19, 2015, a hearing was held before ALJ Michael J. Kopicki. (T at
14 41). Plaintiff appeared with her attorney and testified. (T at 45-57). A further
15 hearing was held on September 9, 2015, before ALJ Ken H. Chau. (T at 61).
16 Plaintiff appeared with her attorney and offered additional testimony. (T at 66-87).
17 The ALJ also received testimony from Elizabeth Brown-Ramos, a vocational expert.
18 (T at 87-92).

19 ¹Citations to ("T") refer to the administrative record transcript at Docket No. 18.

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1 On October 5, 2015, ALJ Chau issued a written decision denying the
2 applications for benefits. (T at 11-40). The ALJ's decision became the
3 Commissioner's final decision on March 17, 2017, when the Appeals Council
4 denied Plaintiff's request for review. (T at 1-7).

5 On April 24, 2017, Plaintiff, acting by and through her counsel, filed this
6 action seeking judicial review of the Commissioner's denial of benefits. (Docket No.

7 1). The Commissioner interposed an Answer on September 6, 2017. (Docket No.
8 12). The parties filed a Joint Stipulation on February 20, 2018. (Docket No. 23).

After reviewing the pleadings, Joint Stipulation, and administrative record, this Court finds that the Commissioner's decision must be reversed and this case remanded for calculation of benefits.

III. DISCUSSION

14 | A. Sequential Evaluation Process

The Social Security Act (“the Act”) defines disability as the “inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months.” 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Act also provides that a

1 claimant shall be determined to be under a disability only if any impairments are of
2 such severity that he or she is not only unable to do previous work but cannot,
3 considering his or her age, education and work experiences, engage in any other
4 substantial work which exists in the national economy. 42 U.S.C. §§ 423(d)(2)(A),
5 1382c(a)(3)(B). Thus, the definition of disability consists of both medical and
6 vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001).

7 The Commissioner has established a five-step sequential evaluation process
8 for determining whether a person is disabled. 20 C.F.R. §§ 404.1520, 416.920. Step
9 one determines if the person is engaged in substantial gainful activities. If so,
10 benefits are denied. 20 C.F.R. §§ 404. 1520(a)(4)(i), 416.920(a)(4)(i). If not, the
11 decision maker proceeds to step two, which determines whether the claimant has a
12 medically severe impairment or combination of impairments. 20 C.F.R. §§
13 404.1520(a)(4)(ii), 416.920(a)(4)(ii).

14 If the claimant does not have a severe impairment or combination of
15 impairments, the disability claim is denied. If the impairment is severe, the
16 evaluation proceeds to the third step, which compares the claimant's impairment(s)
17 with a number of listed impairments acknowledged by the Commissioner to be so
18 severe as to preclude substantial gainful activity. 20 C.F.R. §§ 404.1520(a)(4)(iii),
19 416.920(a)(4)(iii); 20 C.F.R. § 404 Subpt. P App. 1. If the impairment meets or

1 equals one of the listed impairments, the claimant is conclusively presumed to be
2 disabled. If the impairment is not one conclusively presumed to be disabling, the
3 evaluation proceeds to the fourth step, which determines whether the impairment
4 prevents the claimant from performing work which was performed in the past. If the
5 claimant is able to perform previous work, he or she is deemed not disabled. 20
6 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). At this step, the claimant's residual
7 functional capacity (RFC) is considered. If the claimant cannot perform past relevant
8 work, the fifth and final step in the process determines whether he or she is able to
9 perform other work in the national economy in view of his or her residual functional
10 capacity, age, education, and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),
11 416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

12 The initial burden of proof rests upon the claimant to establish a *prima facie*
13 case of entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th
14 Cir. 1971); *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). The initial burden
15 is met once the claimant establishes that a mental or physical impairment prevents
16 the performance of previous work. The burden then shifts, at step five, to the
17 Commissioner to show that (1) plaintiff can perform other substantial gainful
18 activity and (2) a “significant number of jobs exist in the national economy” that the
19 claimant can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th Cir. 1984).

B. Standard of Review

Congress has provided a limited scope of judicial review of a Commissioner's decision. 42 U.S.C. § 405(g). A Court must uphold a Commissioner's decision, made through an ALJ, when the determination is not based on legal error and is supported by substantial evidence. *See Jones v. Heckler*, 760 F.2d 993, 995 (9th Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999).

7 “[The Commissioner’s] determination that a plaintiff is not disabled will be
8 upheld if the findings of fact are supported by substantial evidence.” *Delgado v.*
9 *Heckler*, 722 F.2d 570, 572 (9th Cir. 1983)(citing 42 U.S.C. § 405(g)). Substantial
10 evidence is more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112, 1119
11 n 10 (9th Cir. 1975), but less than a preponderance. *McAllister v. Sullivan*, 888 F.2d
12 599, 601-02 (9th Cir. 1989). Substantial evidence “means such evidence as a
13 reasonable mind might accept as adequate to support a conclusion.” *Richardson v.*
14 *Perales*, 402 U.S. 389, 401 (1971)(citations omitted). “[S]uch inferences and
15 conclusions as the [Commissioner] may reasonably draw from the evidence” will
16 also be upheld. *Mark v. Celebreeze*, 348 F.2d 289, 293 (9th Cir. 1965). On review,
17 the Court considers the record as a whole, not just the evidence supporting the
18 decision of the Commissioner. *Weetman v. Sullivan*, 877 F.2d 20, 22 (9th Cir.
19 1989)(quoting *Kornock v. Harris*, 648 F.2d 525, 526 (9th Cir. 1980)).

1 It is the role of the Commissioner, not this Court, to resolve conflicts in
2 evidence. *Richardson*, 402 U.S. at 400. If evidence supports more than one rational
3 interpretation, the Court may not substitute its judgment for that of the
4 Commissioner. *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th
5 Cir. 1984). Nevertheless, a decision supported by substantial evidence will still be
6 set aside if the proper legal standards were not applied in weighing the evidence and
7 making the decision. *Brawner v. Secretary of Health and Human Services*, 839 F.2d
8 432, 433 (9th Cir. 1987). Thus, if there is substantial evidence to support the
9 administrative findings, or if there is conflicting evidence that will support a finding
10 of either disability or non-disability, the finding of the Commissioner is conclusive.
11 *Sprague v. Bowen*, 812 F.2d 1226, 1229-30 (9th Cir. 1987).

12 **C. Commissioner's Decision**

13 The ALJ determined that Plaintiff had not engaged in substantial gainful
14 activity since July 11, 2013, the alleged onset date, and met the insured status
15 requirements of the Social Security Act through June 30, 2017 (the “date last
16 insured”). (T at 18). The ALJ found that Plaintiff’s history of seizures and stroke;
17 degenerative disc disease of the lumbosacral spine with stenosis; and panic disorder
18 without agoraphobia were “severe” impairments under the Act. (Tr. 18).

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1 However, the ALJ concluded that Plaintiff did not have an impairment or
2 combination of impairments that met or medically equaled one of the impairments
3 set forth in the Listings. (T at 20).

4 The ALJ determined that Plaintiff retained the residual functional capacity
5 (“RFC”) to perform light work, as defined in 20 CFR 404.1567 (b), with the
6 following limitations: Plaintiff can stand/walk for a total of 4 hours in an 8-hour
7 workday; sit for 6 hours in an 8-hour workday; frequently operate foot controls with
8 the left lower extremity; occasionally climb ramps and stairs; never climb
9 ladders/ropes/scaffolds; occasionally balance, stop, kneel, crouch, crawl, walk on
10 uneven terrain; cannot operate motor vehicle or work at unprotected heights; and is
11 limited to simple, routine, and repetitive tasks. (T at 23).

12 The ALJ noted that Plaintiff could not perform her past relevant work as a
13 hand packager or pharmacy helper. (T at 31). Considering Plaintiff’s age (37 years
14 old on the alleged onset date), education (limited), work experience, and residual
15 functional capacity, the ALJ found that jobs exist in significant numbers in the
16 national economy that Plaintiff can perform. (T at 31-32).

17 Accordingly, the ALJ determined that Plaintiff was not disabled within the
18 meaning of the Social Security Act between July 11, 2013 (the alleged onset date)
19 and October 8, 2015 (the date of the decision) and was therefore not entitled to

1 benefits. (T at 33). As noted above, the ALJ's decision became the Commissioner's
2 final decision when the Appeals Council denied Plaintiff's request for review. (T at
3 1-7).

4 **D. Disputed Issues**

5 As set forth in the Joint Stipulation (Docket No. 23), Plaintiff offers four (4)
6 main arguments in support of her claim that the Commissioner's decision should be
7 reversed. First, she argues the ALJ's consideration of the medical opinion evidence
8 was flawed. Second, Plaintiff challenges the ALJ's credibility determination. Third,
9 she argues that the ALJ did not properly consider lay witness testimony. Fourth,
10 Plaintiff asserts that the ALJ's step five analysis was flawed. This Court will
11 address each argument in turn.

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13 **IV. ANALYSIS**

14 **A. Medical Opinion Evidence**

15 In disability proceedings, a treating physician's opinion carries more weight
16 than an examining physician's opinion, and an examining physician's opinion is
17 given more weight than that of a non-examining physician. *Benecke v. Barnhart*,
18 379 F.3d 587, 592 (9th Cir. 2004); *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir.
19 1995). If the treating or examining physician's opinions are not contradicted, they

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1 can be rejected only with clear and convincing reasons. *Lester*, 81 F.3d at 830. If
2 contradicted, the opinion can only be rejected for “specific” and “legitimate” reasons
3 that are supported by substantial evidence in the record. *Andrews v. Shalala*, 53 F.3d
4 1035, 1043 (9th Cir. 1995).

5 The courts have recognized several types of evidence that may constitute a
6 specific, legitimate reason for discounting a treating or examining physician’s
7 medical opinion. For example, an opinion may be discounted if it is contradicted by
8 the medical evidence, inconsistent with a conservative treatment history, and/or is
9 based primarily upon the claimant’s subjective complaints, as opposed to clinical
10 findings and objective observations. *See Flaten v. Secretary of Health and Human*
11 *Servs.*, 44 F.3d 1453, 1463-64 (9th Cir. 1995).

12 An ALJ satisfies the “substantial evidence” requirement by “setting out a
13 detailed and thorough summary of the facts and conflicting clinical evidence, stating
14 his interpretation thereof, and making findings.” *Garrison v. Colvin*, 759 F.3d 995,
15 1012 (9th Cir. 2014)(quoting *Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir. 1998)).
16 “The ALJ must do more than state conclusions. He must set forth his own
17 interpretations and explain why they, rather than the doctors’, are correct.” *Id.*

18 In October of 2013, Dr. Paul Chiu, a pain management specialist and one of
19 Plaintiff’s treating physicians, opined that Plaintiff was “unable to work in any

1 capacity.” (T at 568). Dr. Chiu completed a “Physicians Source Statement” in
2 August of 2015. Dr. Chiu reported that Plaintiff would be “off task” approximately
3 30% of each work day due to her pain and limitations. (T at 790). He stated that
4 Plaintiff was likely to absent from work 5 days or more per month due to pain or
5 treatment, would be unable to complete 6 days or more of work per month, and
6 could efficiently perform a job for a full-day less than 50% of the time. (T at 790).

7 Dr. Nagasamudra Ashok, an internist and another treating physician, reported
8 in March of 2015 that Plaintiff was experiencing 3-4 epileptic seizures per week. (T
9 at 739). Dr. Ashok completed a Medical Source Statement in September of 2015.
10 Dr. Ashok opined that Plaintiff could occasionally lift/carry less than 5 pounds, sit
11 for 90 minutes in an 8-hour workday, and stand/walk for 2 hours in an 8-hour
12 workday. (T at 792). He reported that Plaintiff needed a cane to ambulate. (T at
13 792). Dr. Ashok stated that Plaintiff could never push/pull with her right hand. (T at
14 793). He opined that Plaintiff could occasionally climb stairs and ramps, but never
15 stoop, kneel, crouch, or crawl. (T at 794). Dr. Ashok explained that Plaintiff
16 suffered from frequent muscle spasms that caused “excruciating pain” radiating from
17 the legs to the feet. (T at 793).

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1 The ALJ discounted these treating physician opinions, finding them not “well
2 supported” by the objective record and contradicted by other medical evidence,
3 including assessments from examining and reviewing physicians. (T at 25).

4 This Court finds the ALJ’s consideration of the treating physician opinions
5 not supported by substantial evidence.

6 The ALJ stated that the treating sources’ opinions “appear[ed] to be tainted”
7 by Plaintiff’s efforts to obtain benefits. (T at 26-27). The ALJ explained that the
8 treating physicians “appear[ed] to be actively assisting [Plaintiff’s] attempt to obtain
9 benefits, rather than simply treating her or offering an objective opinion
10 corroborated by the treatment notes.” (T at 27). As such, the ALJ concluded that the
11 opinions “lack[ed] neutrality and reliability.” (T at 27).

12 However, “[t]he purpose for which medical reports are obtained does not
13 provide a legitimate basis for rejecting them,” unless there is additional evidence
14 demonstrating impropriety. The ALJ identified no such evidence here. *Lester v.*
15 *Chater*, 81 F.3d 821, 832 (9th Cir. 1995); *see also Reddick v. Chater*, 157 F.3d 715,
16 726 (9th Cir. 1998); *Ratto v. Secretary*, 839 F. Supp. 1415, 1426 (D. Or. 1993)
17 (“The Secretary may not assume that doctors routinely lie in order to help their
18 patients collect disability benefits.”).

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1 The ALJ also found that the treating physician opinions were contradicted by
2 the medical record, which, the ALJ believed, showed that Plaintiff's "conditions
3 have generally been managed with mainly conservative measures" (T at 25).
4 However, Plaintiff was treated with powerful prescription medication (e.g., Xanax,
5 OxyContin, Ambien, Cymbalta, Medzine, Norvase, and Gabapentin) (T at 547-49)
6 and epidural steroid injections. (T at 627-33). She required the use of a walker to
7 ambulate, which was prescribed. (T at 739). This cannot reasonably be characterized
8 as "limited" or "conservative" treatment. *See Harvey v. Colvin*, 2014 U.S. Dist.
9 LEXIS 107607, at *28 (C.D. Cal. Aug. 5, 2014)(finding that ALJ erred in
10 discounting credibility based on "conservative" treatment where treatment included
11 injections); *Yang v. Barnhart*, 2006 U.S. Dist. LEXIS 90358, at *12-14 (C.D. Cal.
12 Dec. 12, 2006)(concluding that physical therapy, neck surgery, prescription
13 medication, and epidural injections were not "conservative" treatments). In addition,
14 surgery was discussed and recommended, but apparently not pursued because of
15 insurance issues. (T at 624-25, 738).

16 The ALJ also relied on several examining and reviewing physician opinions,
17 finding them more persuasive than the treating physicians' assessments. However,
18 the ALJ's consideration of the non-treating physician opinions was flawed. Some of
19 the non-examining State Agency review physicians did render opinions consistent

1 with the ALJ's RFC determination. (T at 27, 101-103, 103-105, 134-36, 136-38).
2 However, the opinion of a non-examining, State Agency physician does not, without
3 more, justify the rejection of a treating physician's opinion. *Lester v. Chater*, 81 F.3d
4 821, 831 (9th Cir. 1995)(citing *Pitzer v. Sullivan*, 908 F.2d 502, 506 n.4 (9th Cir.
5 1990)).

6 The ALJ also relied on the assessments of three consultative examiners, but
7 the analysis of these opinions was both poorly-articulated and insufficiently
8 reasoned. (T at 27-28). Dr. Ulin Sargeant performed a consultative examination in
9 October of 2013. Dr. Sargeant noted that Plaintiff had "very weak and poor
10 balance" of the left lower extremity and needed a walker to ambulate and for
11 balance. (T at 612, 614). This finding, which was consistent with the treating
12 physicians' opinions and one of the State Agency review assessments, was rejected
13 by the ALJ for the vague reason that it was "not supported by the objective findings
14 and other medical evidence." (T at 27).

15 Dr. Sarah Maze performed a consultative examination in April of 2015.
16 However, Plaintiff's counsel raised serious questions as to Dr. Maze's qualifications
17 and credibility.² The ALJ appeared to acknowledge the validity of these concerns (T
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19 ² In sum, Dr. Maze identified herself as a "Board Eligible, Neurologist." (T at 743). Plaintiff's counsel argued that this
20 was not a proper designation and, in fact, is a designation forbidden by the American Board of Neurology. (T at 64).

1 at 28), but still afforded some unspecific amount of weight to Dr. Maze's opinion,
2 while stating that he was relying "primarily" on the "longitudinal treatment records."
3 (T at 28). However, the ALJ expressly relied on Dr. Maze's assessment when
4 justifying his decision to discount the treating physicians' opinion. (T at 25). Given
5 the issues related to Dr. Maze's qualifications and credibility, which the ALJ
6 acknowledged and made no effort to resolve, this was error.

7 The ALJ also offered conflicting and confused analysis regarding the opinion
8 of Dr. Nina Kapitanski, an examining psychiatrist. Dr. Kapitanski performed a
9 consultative psychiatric evaluation in October of 2013. She diagnosed panic
10 disorder without agoraphobia, along with a history of alcohol and amphetamine
11 abuse in full sustained remission. (T at 608).

12 Dr. Kapitanski assigned a Global Assessment of Functioning ("GAF") score³
13 of 55 (T at 608), which is indicative of moderate symptoms or difficulty in social,
14 occupational or educational functioning. *Metcalfe v. Astrue*, No. EDCV 07-1039,
15 2008 US. Dist. LEXIS 83095, at *9 (Cal. CD Sep't 29, 2008). Dr. Kapitanski
16 opined that Plaintiff would have "moderate limitations completing a normal
17 workday or work week due to her mental condition." (T at 608). She also stated that

18 ³"A GAF score is a rough estimate of an individual's psychological, social, and occupational
19 functioning used to reflect the individual's need for treatment." *Vargas v. Lambert*, 159 F.3d 1161,
1164 n.2 (9th Cir. 1998).

1 Plaintiff would have “moderate difficulties” handling the usual stresses, changes,
2 and demands of gainful employment. (T at 608).

3 These findings are consistent with the assessment of Dr. Chiu, one of the
4 treating physicians, who likewise believed that Plaintiff’s ability to sustain work
5 activities throughout a workday and over the course of a workweek was impaired. (T
6 at 790). Dr. Schumacher, one of the State Agency review physicians, also found
7 Plaintiff moderately limited with regard to responding appropriately to changes in
8 the work setting and noted a need for “reduced interpersonal contact.” (T at 105).

9 After initially citing Dr. Kapitanski’s evaluation in support of his decision to
10 discount the treating physicians’ opinions (T at 25), the ALJ opted not to accept Dr.
11 Kapitanski’s assessment of Plaintiff’s limitations, finding the assessment
12 insufficiently specific and inadequately supported. (T at 28). However, the only
13 reason articulated for this result was that Dr. Kapitanski did not explicitly define the
14 term “moderate” in her assessment. (T at 28). The ALJ’s rationale is weak,
15 particularly since his RFC determination did not include *any* limitation with regard
16 to Plaintiff’s ability to sustain work over the course of a workweek or handle work
17 stress. (T at 23). Stress is “highly individualized” and a person with a mental health
18 impairment “may have difficulty meeting the requirements of even so-called ‘low-
19 stress’ jobs.” SSR 85-15. As such, the issue of stress must be carefully considered

1 and “[a]ny impairment-related limitations created by an individual’s response to
2 demands of work . . . must be reflected in the RFC assessment.” Id.; *see also Perkins*
3 *v. Astrue*, No. CV 12-0634, 2012 U.S. Dist. LEXIS 144871, at *5 (C.D.Ca. Oct. 5,
4 2012). The ALJ’s consideration of the psychiatric evidence, including in particular,
5 Dr. Kapitanski’s report, was insufficient for the reasons outlined above.

6 The ALJ also found the underlying treatment record inconsistent with the
7 treating physicians’ assessments. (T at 24-25). In part, this was based on the ALJ’s
8 conclusion that Plaintiff’s treatment regimen was “conservative,” a conclusion this
9 Court finds flawed for the reasons stated above. Moreover, the contemporaneous
10 records consistently documented decreased range of motion, tenderness and pain,
11 and significant symptoms, including seizures, anxiety, and depression. (T 405-515,
12 621-23, 671-86, 687-92).

13 Further, the ALJ missed a critical piece related to Plaintiff’s ability to sustain
14 work activities over an extended period under stress. Even if one adopts the ALJ’s
15 reading of the record to the effect that Plaintiff’s symptoms were relatively well
16 managed with medication and injections, that does not speak to the concern raised
17 by Dr. Chiu and Dr. Kapitanski regarding her ability to sustain work activities under
18 stress. Individuals with chronic health problems “commonly have their lives
19 structured to minimize stress and reduce their signs and symptoms.” *Courneya v.*

1 *Colvin*, No. CV-12-5044, 2013 U.S. Dist. LEXIS 161332, at *13-14 (E.D.W.A.
2 Nov. 12, 2013)(quoting 20 C.F.R. Pt. 404, Subp't P, App. 1 § 12.00(D)); *see also*
3 *Holohan v. Massanari*, 246 F.3d 1195, 1205 (9th Cir. 2001) (“[The treating
4 physician's] statements must be read in context of the overall diagnostic picture he
5 draws. That a person who suffers from severe panic attacks, anxiety, and depression
6 makes some improvement does not mean that the person's impairments no longer
7 seriously affect her ability to function in a workplace.”).

8 In light of the foregoing, this Court finds that the ALJ's decision to discount
9 the treating physicians' opinions is not supported by substantial evidence and cannot
10 be sustained.

11 **B. Credibility**

12 A claimant's subjective complaints concerning his or her limitations are an
13 important part of a disability claim. *Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d
14 1190, 1195 (9th Cir. 2004)(citation omitted). The ALJ's findings with regard to the
15 claimant's credibility must be supported by specific cogent reasons. *Rashad v.*
16 *Sullivan*, 903 F.2d 1229, 1231 (9th Cir. 1990). Absent affirmative evidence of
17 malingering, the ALJ's reasons for rejecting the claimant's testimony must be “clear
18 and convincing.” *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995). “General
19 findings are insufficient: rather the ALJ must identify what testimony is not credible

1 and what evidence undermines the claimant's complaints." *Lester*, 81 F.3d at 834;
2 *Dodrill v. Shalala*, 12 F.3d 915, 918 (9th Cir. 1993).

3 However, subjective symptomatology by itself cannot be the basis for a
4 finding of disability. A claimant must present medical evidence or findings that the
5 existence of an underlying condition could reasonably be expected to produce the
6 symptomatology alleged. See 42 U.S.C. §§423(d)(5)(A), 1382c (a)(3)(A); 20 C.F.R.
7 § 404.1529(b), 416.929; SSR 96-7p.

8 In this case, Plaintiff reported biweekly seizures and severe back pain. She
9 used a walker daily. She had difficulty sleeping and needed help with hygiene and
10 taking her medications. She can follow written instructions, but not verbal
11 instructions. (T at 348-56). Plaintiff lives with three of her children. (T at 46).
12 During seizures she sometimes loses control of her bowels and bladder. (T at 53-55).
13 She might be able to walk 15 feet without her walker but is afraid to try. (T at 71-72,
14 85).

15 The ALJ concluded that Plaintiff's medically determinable impairments could
16 reasonably be expected to cause the alleged symptoms, but found her statements
17 regarding the intensity, persistence, and limiting effects of the symptoms not fully
18 credible. (T at 24).

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1 First, the ALJ found Plaintiff's subjective statements inconsistent with the
2 objective medical evidence. (T at 24). However, the ALJ's analysis of the objective
3 medical evidence was flawed. As discussed above, the ALJ improperly discounted
4 the treating physicians' assessments, failed to adequately account for Plaintiff's need
5 for a walker (as acknowledged by treating and examining physicians), and did not
6 appropriately address Plaintiff's difficulties in sustaining work activities over time
7 under stress (as assessed by treating and examining physicians). This failure of
8 analysis likewise impacted the assessment of Plaintiff's credibility in that many of
9 her subjective statements are, in fact, supported by objective evidence, when
10 properly considered.

11 Second, the ALJ placed undue emphasis on Plaintiff's rather limited activities
12 of daily living, which included preparing simple meals and some shopping. (T at
13 29). Again, the ALJ failed to account for the documented concern that Plaintiff
14 would not be able to sustain activities when faced with the stress demands of work.
15 The Ninth Circuit "has repeatedly asserted that the mere fact that a plaintiff has
16 carried on certain daily activities ... does not in any way detract from her credibility
17 as to her overall disability." *Orn v. Astrue*, 495 F.3d 625, 639 (9th Cir. 2007)
18 (quoting *Vertigan v. Halter*, 260 F.3d 1044, 1050 (9th Cir. 2001)). "The Social
19 Security Act does not require that claimants be utterly incapacitated to be eligible for

1 benefits, and many home activities are not easily transferable to what may be the
2 more grueling environment of the workplace, where it might be impossible to
3 periodically rest or take medication.” *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir.
4 1989).

5 Recognizing that “disability claimants should not be penalized for attempting
6 to lead normal lives in the face of their limitations,” the Ninth Circuit has held that
7 “[o]nly if [her] level of activity were inconsistent with [a claimant’s] claimed
8 limitations would these activities have any bearing on [her] credibility.” *Reddick v.*
9 *Chater*, 157 F.3d 715, 722 (9th Cir. 1998)(citations omitted); *see also Bjornson v.*
10 *Astrue*, 671 F.3d 640, 647 (7th Cir. 2012)(“The critical differences between
11 activities of daily living and activities in a full-time job are that a person has more
12 flexibility in scheduling the former than the latter, can get help from other persons...,
13 and is not held to a minimum standard of performance, as she would be by an
14 employer. The failure to recognize these differences is a recurrent, and deplorable,
15 feature of opinions by administrative law judges in social security disability
16 cases.”)(cited with approval in *Garrison v. Colvin*, 759 F.3d 995, 1016 (9th Cir.
17 2014)).

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1 Third, Plaintiff has an excellent work record (T at 48-49, 306-28), which
2 provides another reason for crediting her claims. *Pazos v. Astrue*, No. 08-6882, 2009
3 U.S. Dist. LEXIS 33970, at *29 (Cal. C.D. Mar. 30, 2009).

4 Fourth, the ALJ discounted Plaintiff's credibility for failing to see specialists
5 recommended by primary care providers, while recognizing that Plaintiff's financial
6 difficulties created a barrier that limited her health care access. (T at 29). This was
7 error. Under SSR 96-7p, an ALJ must not draw an adverse inference from a
8 claimant's failure to seek or pursue treatment "without first considering any
9 explanations that the individual may provide, or other information in the case record,
10 that may explain infrequent or irregular medical visits or failure to seek medical
11 treatment." *Id.*; *see also Dean v. Astrue*, No. CV-08-3042, 2009 U.S. Dist. LEXIS
12 62789, at *14-15 (E.D. Wash. July 22, 2009). Indeed, "financial concerns [might]
13 prevent the claimant from seeking treatment [or] . . . the claimant [may] structure[]
14 his daily activities so as to minimize symptoms to a tolerable level or eliminate them
15 entirely." *Id.*

16 For the foregoing reasons, this Court finds the ALJ's credibility determination
17 flawed.

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1 **C. Lay Testimony**

2 “Testimony by a lay witness provides an important source of information
3 about a claimant’s impairments, and an ALJ can reject it only by giving specific
4 reasons germane to each witness.” *Regennitter v. Comm’r*, 166 F.3d 1294, 1298 (9th
5 Cir. 1999).

6 In this case, Margaret Robinson, a friend of Plaintiff, submitted a function
7 report in October 2013. Ms. Robinson had known Plaintiff for 24 years and visited
8 her 2 to 3 times a week. (T at 360). According to Ms. Robinson, Plaintiff can
9 “barely walk” and uses a walker. (T at 360). She reported that Plaintiff needs help
10 with basic activities of daily living, including dressing, bathing, and cleaning her
11 home. (T at 361). Plaintiff needs reminders to take her medication. (T at 362). Ms.
12 Robinson stated that Plaintiff had mood swings and depressive symptoms, with
13 limited social activities and a limited attention span. (T at 365). She reported that
14 Plaintiff has difficulty handling stress and changes in routine. (T at 366).

15 The ALJ discounted Ms. Robinson’s statements. He noted that Ms. Robinson
16 was not an expert, could only record her personal observations, and was likely
17 influenced by her affinity for Plaintiff. (T at 31). However, this amounts to re-
18 stating the definition of a lay witness – a non-expert connected to the claimant who
19 offers his/her personal observations regarding the claimant’s activities and

1 limitations. In other words, the ALJ faulted the lay witness for being a lay witness.
2 This was error. If these are valid reasons for rejecting lay testimony, then all such
3 testimony would be *ipso facto* rejected, which is clearly not the correct result. See
4 *Dodrill v. Shalala*, 12 F.3d 915, 918-19 (9th Cir. 1993) (“[F]riends and family
5 members in a position to observe a claimant's symptoms and daily activities are
6 competent to testify as to her condition.”). To the extent the ALJ discounted the lay
7 testimony as inconsistent with the objective medical evidence, that finding is
8 undermined by the ALJ’s errors in assessing the medical evidence, as outlined
9 above.

10 **D. Step Five Analysis**

11 At step five of the sequential evaluation, the burden is on the Commissioner to
12 show that (1) the claimant can perform other substantial gainful activity and (2) a
13 “significant number of jobs exist in the national economy” which the claimant can
14 perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th Cir. 1984). If a claimant cannot
15 return to his previous job, the Commissioner must identify specific jobs existing in
16 substantial numbers in the national economy that the claimant can perform. See
17 *Johnson v. Shalala*, 60 F.3d 1428, 1432 (9th Cir.1995). The Commissioner may
18 carry this burden by “eliciting the testimony of a vocational expert in response to a
19 hypothetical that sets out all the limitations and restrictions of the claimant.”

1 *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir.1995). The ALJ's depiction of the
2 claimant's disability must be accurate, detailed, and supported by the medical record.
3 *Gamer v. Secretary of Health and Human Servs.*, 815 F.2d 1275, 1279 (9th
4 Cir.1987). "If the assumptions in the hypothetical are not supported by the record,
5 the opinion of the vocational expert that claimant has a residual working capacity
6 has no evidentiary value." *Gallant v. Heckler*, 753 F.2d 1450, 1456 (9th Cir. 1984).

7 Relying on the vocational expert's testimony, the ALJ concluded in this case
8 that Plaintiff could perform work that exists in significant numbers in the national
9 economy. (T at 32-33). However, the ALJ did not incorporate all of the appropriate
10 limitations into the hypothetical on which he relied.

11 The record, including assessments from treating and examining physicians,
12 demonstrated Plaintiff's need for a walker. (T at 614, 739). The need for a walker
13 was not included in the hypothetical relied upon by the ALJ. (T at 88-9). This was
14 significant because the vocational expert testified that the need to use a walker
15 would preclude employment due to workplace safety issues. (T at 90). In addition,
16 the hypothetical relied on by the ALJ did not contain any limitation with regard to
17 sustaining work activities over the course of workday and workweek with normal
18 work stress. (T at 88-89). As discussed above, the ALJ's conclusion that Plaintiff

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1 did not have any stress-related work limitations was not supported by substantial
2 evidence. As such, this is also an error with regard to the step five analysis.

3 **E. Remand**

4 In a case where the ALJ's determination is not supported by substantial
5 evidence or is tainted by legal error, the court may remand for additional
6 proceedings or an immediate award of benefits. Remand for additional proceedings
7 is proper where (1) outstanding issues must be resolved, and (2) it is not clear from
8 the record before the court that a claimant is disabled. *See Benecke v. Barnhart*, 379
9 F.3d 587, 593 (9th Cir. 2004).

10 In contrast, an award of benefits may be directed where the record has been
11 fully developed and where further administrative proceedings would serve no useful
12 purpose. *Smolen v. Chater*, 80 F.3d 1273, 1292 (9th Cir. 1996). Courts have
13 remanded for an award of benefits where (1) the ALJ has failed to provide legally
14 sufficient reasons for rejecting such evidence, (2) there are no outstanding issues that
15 must be resolved before a determination of disability can be made, and (3) it is clear
16 from the record that the ALJ would be required to find the claimant disabled were
17 such evidence credited. *Id.* (citing *Rodriguez v. Bowen*, 876 F.2d 759, 763 (9th
18 Cir.1989); *Swenson v. Sullivan*, 876 F.2d 683, 689 (9th Cir. 1989); *Varney v. Sec'y of
19 Health & Human Servs.*, 859 F.2d 1396, 1401 (9th Cir.1988)).

1 Here, the Commissioner failed to provide sufficient reasons for rejecting
2 assessments for treating and examining physicians and for discounting Plaintiff's
3 credibility. There are no outstanding issues that must be resolved before a
4 determination of disability can be made. It is clear from the record that the ALJ
5 would be required to find the claimant disabled were such evidence credited
6 (particularly the evidence regarding the need to use a walker to ambulate and
7 Plaintiff's limitations with regard to sustained work activity under stress).

8 The Commissioner argues in conclusory fashion that a remand for further
9 proceedings would be the appropriate remedy if this Court were to find the ALJ's
10 decision not supported by substantial evidence. However, it is not clear what
11 purpose such a remand would serve in this particular case. The Ninth Circuit has
12 held that it is not appropriate to "remand for the purpose of allowing the ALJ to have
13 a mulligan." *Garrison v. Colvin*, 759 F.3d 995, 1012, 1021 (9th Cir. 2014). Indeed,
14 "[a]llowing the Commissioner to decide the issue again would create an unfair
15 'heads we win; tails, let's play again' system of disability benefits adjudication."
16 *Benecke v. Barnhart*, 379 F.3d 587, 595 (9th Cir. 2004).

17 As such, this Court finds that a remand for calculation of benefits is the proper
18 result.

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V. ORDERS

IT IS THEREFORE ORDERED that:

Judgment be entered REVERSING the Commissioner's decision and
REMANDING this action for calculation of benefits, and it is further ORDERED
that

The Clerk of the Court file this Decision and Order, serve copies upon counsel for the parties, and CLOSE this case without prejudice to a timely application for attorneys' fees and costs.

DATED this 25th day of September 2018,

/s/Victor E. Bianchini
VICTOR E. BIANCHINI
UNITED STATES MAGISTRATE JUDGE